Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Submitted by

NEXSTAR BROADCASTING, INC.

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SUMMARY

Nexstar Broadcasting, Inc. ("Nexstar") hereby submits these comments in the response to the Commission's July 2006 *Further Notice of Proposed Rulemaking* on broadcast ownership. Nexstar's comments relate solely to the local television ownership rule, Section 73.3555(b) of the Commission's rules. Nexstar urges the Commission to revise the local television ownership rule to permit television broadcasters with no other in-market attributable media interests to own two commercial television stations in a market.

Today's media marketplace is extremely competitive. Several large companies control the networks and the studios which produce distribute syndicated programming. Multichannel video programming providers are competing on the local level with television stations for viewers, advertising, and even for local sales personnel. Local television broadcasters also are competing for advertising revenues with local radio companies that have consolidated management and sales functions. In addition, local broadcasters are competing with the Internet, as more and more Americans are obtaining news and information online and the TV networks are providing their entertainment programming for download to various consumer devices through the Internet.

Although the current local television ownership rule (and the revised rule adopted in 2003) permit common ownership of two television stations in some markets, the rule prohibits common ownership of two of the top-four ranked stations in a market (the "Local TV Ownership Rule"). This top-four prohibition is based on faulty assumptions, ignores market realities and unfairly discriminates against medium and small market broadcasters.

The Commission retained the top-four prohibition based on its findings that duopolies reduce programming choices and viewpoint diversity for local viewers. However, viewers are

not harmed by duopolies because most local stations are affiliated with different television networks (which broadcast entirely separate programming); broadcasters do not broadcast the same syndicated programming on co-owned stations; and broadcasters do not broadcast identical news programming on co-owned stations.

Further, the Local TV Ownership Rule is discrimination without logic. Revenues in New York City and Los Angeles are the largest in the nation. Revenues in Terre Haute and Utica are among some of the smallest in the nation. Yet the same competitive pressures are present in all markets, with small and medium markets feeling greater effects from such pressures. Nonetheless, in New York and Los Angeles, a broadcaster can own two television broadcast stations while in Terre Haute and Utica, a broadcaster cannot. This is counter-intuitive. The top-four prohibition found in the Local TV Ownership Rule precludes real regulatory relief in small and medium markets.

Local television stations play a vital role in their communities by providing numerous viewer and community benefits. The cost savings generated through the efficiencies of common ownership of two stations are especially important in medium and small markets. Unless the Commission eliminates the top-four prohibition it risks relegating medium and small market broadcasters to second class citizens, forced to reduce services to their local communities. Thus, the Commission should consider today's realities and permit common ownership of two stations in a market regardless of the size of the market or the rankings of the stations.

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To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Nexstar Broadcasting, Inc. ("Nexstar"), by its attorneys, respectfully submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") (FCC 06-93, released July 24, 2006) in the above-captioned proceedings. In the FNPRM, the Commission asks for input on various issues remanded to the Commission by the U.S. Court of Appeals for the Third Circuit (the "Court") with respect to rule changes the Commission adopted during its 2002 Biennial Review. The Commission also asks for input as to whether the

Commission's longstanding policy goals of competition, diversity and localism would be better addressed by employing alternative rules.

Nexstar is the licensee of 29 full-power broadcast stations licensed to communities in Designated Market Areas ("DMAs") 53 through 201.[1] In addition, through various agreements, Nexstar provides services to stations that other companies own in fifteen of its markets. Nexstar is a pure television broadcasting company – i.e., Nexstar only owns and provides services to television stations and does not own cable systems, newspapers, radio stations or any other type of media. Although the FNPRM seeks comment with respect to several rules, Nexstar's comments relate only to the issues raised with respect to the local television ownership rule, Section 73.3555(b) of the Commission's rules.

The Commission's current ownership rules permit "Big Media" – companies that dominate the national media landscape such as Disney/ABC, Viacom/CBS, General Electric/NBC Universal, News Corp/Fox, Time Warner, Google and Yahoo! – to grow bigger, but provide no regulatory relief to medium and small market television station owners that are competing against Big Media. Nexstar believes it is imperative in the current competitive and multi-faceted communications marketplace that the Commission recognize that many local television broadcasters are not Big Media. The Commission should adopt ownership rules that will help local television broadcasters compete more effectively against Big Media. Nexstar urges the Commission to adopt a local television ownership rule that will allow pure television broadcasters with no other in-market attributable media interests to own two commercial

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[1] Nexstar's station WHAG-TV, Hagerstown, Maryland is technically in the Washington D.C. DMA, DMA No. 8. However, the Commission has recognized that this station does not provide service to the Washington, D.C. metropolitan area and has categorized the station as a "remaining market station" for regulatory fee purposes. *See Letter to Melodie A. Virtue, Request for Reduction of Regulatory Fee – Great Trails Broadcasting Corporation*, June 2, 1998.

television stations in a market. Otherwise, as competitive pressures continue to increase, small and medium market television broadcasters may be forced to reduce local programming and community involvement in order to survive.

I. INTRODUCTION.

In 1999, the Commission adopted the current local TV ownership rule (the "Current Local TV Ownership Rule"), which permits one entity to own, operate or control two television stations in the same DMA if the Grade B contours of the stations do not overlap or, if at the time an application to acquire the second station is submitted, at least one of the stations is not ranked among the top-four stations in the market and at least eight independently owned and operating full-power television stations would remain in the market. The Commission adopted these "voice" and ranking requirements based on its conclusions then that television broadcast stations were the primary source of news and entertainment programming for Americans; that non-television broadcast alternatives were not widely accessible or meaningful substitutes for broadcast television; and that such a rule was necessary to preserve viewpoint diversity in local news presentations.[2]

In 2003, the Commission proposed to modify the Current Local TV Ownership Rule to permit common ownership of two television stations in markets with 17 or fewer television stations, and up to three television stations in markets with 18 or more television stations; but the Commission retained the requirement that no entity could acquire more than one station ranked among the top four stations in a market (the "2003 Local TV Ownership Rule," collectively with

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[2] *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999), subsequent history omitted ("*1999 Biennial Review Order*").

the Current Local TV Ownership Rule, the "Local TV Ownership Rules").[3] The Commission determined that continuing the top-four prohibition was necessary because common ownership of two top-four ranked stations would lead to antitrust concerns and a concentration of market power with no corresponding public interest benefits (i.e., there would be no additional local programming benefits, no DTV benefits, and a general reduction in incentive to improve programming that appeals to a mass audience).[4] However, the 2003 Local TV Ownership Rule did not become effective.[5]

Although the 2003 Local TV Ownership Rule permits more duopoly opportunities for television broadcasters, the Commission's continued prohibition of common ownership of two top-four ranked stations ignores market realties. For example, in the Wilkes-Barre/Scranton DMA, WNEP-TV, owned by The New York Times Company, is far and away the market leader in terms of audience ratings. Nonetheless, the Local TV Ownership Rules prohibit common ownership of the second and fourth or third and fourth ranked stations no matter what the stations' combined ratings would be, even if the combined ratings of two such stations would not equal the ratings of WNEP-TV. Moreover, if the Commission eliminates the television/newspaper cross-ownership rule (as was proposed in the *2002 Biennial Review Order*), The New York Times Company would be able to own the dominant local television station and

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[3] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13691 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part*, *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004) ("*Prometheus*"), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

[4] *Id.* at 13696-97.

[5] The Court of Appeals for the Third Circuit stayed the effectiveness of the 2003 Local Television Ownership Rule pending review and continued the stay pending its review of the Commission's action on remand. *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3rd Cir., Sept 3, 2003) (*per curium*); *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004).

another TV station (so long as the second station is not a top-four station at the time of acquisition), as well as one or more of the three local newspaper(s) serving the Scranton-Wilkes-Barre market, and even local radio stations.

The Local TV Ownership Rules permit Time Warner to own the local cable system, fifty percent of a broadcast TV network (The CW), ten cable programming channels, and a local television station and radio stations. The Local TV Ownership Rules permit one licensee to own a television station and multiple radio stations in the market. In this context it makes no sense to prevent a television broadcaster that owns no other in-market media interests from owning a second, top-four television station in the market. Clearly, the Local TV Ownership Rules do not create a level playing field for television-only broadcasters.

The Commission's determination that permitting common ownership of two top-four ranked broadcast stations will not improve local programming and/or will reduce programming quality also ignores market realities. The Commission's assumption that allowing common ownership of two top-four ranked television stations will not result in increased local programming is based on a tenuous supposition that a local TV broadcaster that already produces local programming will not expand such programming if permitted to own a second station. This Commission assumption is simply that – an assumption. There is no empirical evidence that stations under common ownership will not provide additional local news and public affairs programming. In fact, Nexstar's locally-produced programming has expanded in markets where it has entered into shared services arrangements that generate some of the efficiencies available to stations under common ownership.

Equally specious is the Commission's statement that combinations among the top-four ranked stations will have a negative impact on mass audience programming because the stations would coordinate programming to minimize competition. This Commission assumption entirely ignores the reality that nearly all top-four ranked stations are affiliates of the ABC, CBS, Fox or NBC networks, so during most prime-time and many other time slots, the networks select the programming, not the affiliates. In addition, Disney, Viacom, GE, Time Warner and Fox control the majority of studio production for syndicated programming and are competing with each other to provide stations with their syndicated programming.

Revenues in New York City and Los Angeles are the largest in the nation. Revenues in Terre Haute and Utica are among some of the smallest in the nation. However, in New York and Los Angeles, a broadcaster can own two television broadcast stations while in Terre Haute and Utica, a broadcaster cannot. This is discrimination without logic – the same competitive conditions apply in large, medium and small markets and providing regulatory relief to larger markets, not smaller markets (where regulatory relief is most needed), is counter-intuitive. Accordingly, the Commission should not make duopoly determinations based on market size or rank. Instead, the Commission should adopt a local TV ownership rule that conforms to market realities. Doing otherwise relegates medium and small market television broadcasters with no other in-market media interests to second class media citizens.

II. TELEVISION BROADCASTERS ARE OPERATING IN AN INCREASINGLY COMPETITIVE ENVIRONMENT.

Today's media marketplace is highly competitive. When the Commission enacted the local television ownership rule in 1964, there were only 649 television stations and three national networks. Today, there are 1,752 full-power television stations, 589 Class A television stations and seven commercial, English-language broadcast television networks, as well as PBS and several Spanish-language networks. In addition, the cable industry was in its infancy in 1964 and its primary purpose was to transmit the signals of over-the-air broadcast stations to areas with poor over-the-air reception. Today, multi-channel video program distributors ("MVPDs") reach nearly all U.S. TV households, providing over 100 channels of programming. There also are more local radio stations than ever before, and XM Radio and Sirius continue to grow in subscribership. Daily and weekly local newspapers remain readily available. Billboard owners are creating LED video billboards which offer greater flexibility.[6] And the Internet abounds with sites that consumers routinely turn to for information.

In fact, today:

Television broadcasters compete not only with other in-market television broadcasters for viewership but also with a plethora of non-broadcast TV programming networks. Advertising-supported cable programming averaged a 49.75 total day share among 18-49 year olds in a recent twelve-month period, with an average share of 48.25 during prime time.[7] In addition, television broadcasters compete for advertising dollars against local cable providers who sell commercial advertising time in cable programming through interconnects.[8] In some markets, local television stations are competing with cable companies with respect to local news. For example, Time

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6 This new technology permits the creation of billboards that are in full color and large format and can provide multiple messages (one sign can show a loop of continuous messages). In addition, changing a sign message is as easy as clicking with a mouse button, rather than sending out a crew to pull down and replace a billboard message. This technology also can provide a series of connected video screens to provide everything from a broad-based advertising presence (sign messages on continuous video loops) to very tightly controlled demographic-specific displays tailored to the time of day or day of the week – for example, weekday morning commuters or mid-afternoon shoppers, or special weekend sales announcements presented to Friday evening home commuters.

7 *Seasonality? Ad Supported Cable Takes Lead Year Round*, Research Snapshots, Cable Advertising Bureau, rel. August 1, 2006, http://www.onetvworld.org/?module=displaystory&story_id=1497&format=html. *See also Summer Scorecard – Ad-supported cable grows, broadcast loses*, Anne Becker, Broadcasting & Cable, Sept. 4, 2006, p. 3.

8 Cable interconnects sell the local advertising for national cable programming channels such as ESPN, TNT, Lifetime, USA Networks and many others, and are generally under common ownership with the dominant local cable provider in a market.

Warner produces local news channels in several of its markets.[9] Local television broadcasters also are competing against these same cable interconnects for the employment services of talented sales, news and production personnel.

Television broadcasters also compete against radio broadcast station owners who, even in the smallest of markets, are permitted to own as many as half of the radio broadcast stations in the market. In a typical market, television broadcasters are competing against two or three radio ownership groups which own several local stations and have consolidated management and sales functions that permit them to operate efficiently.

Television broadcasters compete against local and national newspapers and against news information providers available on the Internet. Approximately 70 percent of the 137 million adults who went online in 2005 used the Internet for news, with a full 11 percent indicating that they now obtain most of their news from online sources.[10]

In addition, local television broadcasters routinely face competition on many other fronts as viewers have gained total control over how and where they watch TV. Networks are repurposing programming on cable networks within days, and sometimes hours, of a program's broadcast on local television. Further, many households are wired for Internet broadband service and, with broadband, viewers can easily access network content on network websites. The networks increasingly are making their programming available the day after it is broadcast. For example, CBS began simulcasting its evening news online beginning September 5, 2006 and

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9 Time Warner operates news channels in New York City (NY1), Tampa (Bay News 9), Orlando (Central Florida News 13), Austin (News 8 Austin), Raleigh-Durham and Charlotte (News 14 Carolina), Albany (Capital News 9), Syracuse (News 10 Now), and Rochester (R News). *See* http://en.wikipedia.org/wiki/NY1.

10 *See The State of the News Media 2006: An Annual Report on American Journalism*, Project for Excellence in Journalism, www.stateofthenewsmedia.org/2006/narrative_online_audience.asp?cat=3&media=4 ("*State of the News Media*").

viewers can now download ABC and NBC programming from iTunes one day after broadcast for $1.99 per show. ABC's viewers also can go directly to ABC's website and download the programming, which includes advertising, for free. In addition, some of the networks are partnering with Google as a means of content distribution.

Television broadcasters also are facing increased competition from Internet content providers. Internet TV websites such as YouTube, Lasoo and Interactive TV Networks provide niche or unique programming content.[11] Sporting events such as the NCAA college basketball tournament and major league baseball games are available for purchase "live" on the Internet. AOL's In2TV, an advertising-supported broadband TV network, is streaming "old" television shows such as *Eight is Enough, Maverick, Pinky and the Brain* and *Growing Pains* (and at least 45 others), and viewers now can download TV shows from Amazon.com. There is even a company proposing to export live and on-demand television programming around the world through the Internet.[12] In addition to all this, there are thousands of blogs dedicated to providing information and numerous social networking opportunities such as MySpace and Craigslist. As former Commissioner Quello has stated, "the Internet is the super all-purpose communications device of today [and] today all media is universally available on the net."[13]

Technology is also rapidly altering the way consumers obtain programming and information and these changes are impacting the way television broadcasters compete.

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[11] YouTube is an entirely new medium where consumers go to watch videos more than 100 million times a day. In addition, people are submitting more than 65,000 new videos each day. *YouTube Model is Compromise Over Copyrights*, Kevin J. Delaney and Ethan Smith, Wall Street Journal, Sept. 19, 2006, p. B1. In addition, under YouTube's recent agreement with CBS, consumers will now be able to access CBS and Showtime news, sports and entertainment content on YouTube's website.

[12] *TV Anywhere* to *Push the Borders of U.S. Television*, Jeff Baumgartner, CED Magazine, August 30, 2006 (www.cedmagazine.com/article/CA6367258.html).

[13] *Let Broadcasters Be Free*, James H. Quello, Broadcasting and Cable, September 4, 2006, p. 30.

Television programming is being routinely time-shifted by digital video recorders and, more recently, slingboxes. More people are viewing content on their iPods, mobile phones, portable DVD players and play stations, lap-top computers and other types of portable consumer devices. Today viewers can access television and other programming content on-the-go through service providers such as MediaFlo and MobiTV.[14] Indeed, it is the very ability of consumers to access news "wherever they want" that makes services such as MediaFlo attractive, and it is only a matter of time before all small mobile electronics devices will permit consumers to access news and other information on-the-go. Portable media is changing the economic model for both networks and local station owners because these new technologies are leading advertisers to decrease their planned TV spending as they shift to other media.[15]

Whether a television-only broadcaster is operating in a market ranked number 5, 50, 150 or 210, the broadcaster is facing the substantial competitive pressures described above. And while competition is increasing, revenues in medium and small markets are shrinking, thereby creating an urgent need for medium and small market broadcasters to operate as efficiently as possible. Yet the Commission's ownership rules irrationally continue to prohibit TV-only broadcasters from achieving efficiencies through the consolidation of two top-four ranked television stations, while permitting consolidation between local cable companies and TV stations, local radio and TV stations, and perhaps shortly local newspapers and TV stations.

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[14] At least one research firm is predicting that 24 million consumers will be watching TV or video on mobile handsets by 2010. *Will Consumers Tune In To a Tiny TV in Their Hand?*, Edward C. Baig, USA Today, August 17, 2006.

[15] *Reshaping of Revenue at Forefront of NATPE*, Diane Mermigas, January 24, 2006 www. hollywoodreporter.com/thr/columns/column_display.jsp?vnu_content_id=1001883571.

III. PERMITTING COMMON OWNERSHIP OF TWO TOP-FOUR RANKED TELEVISION STATIONS WILL SERVE THE PUBLIC INTEREST.

Television broadcasters transmit their programming for free to over-the-air viewers and rely primarily on advertising sales for revenues to cover the ever-increasing costs of such programming. However, advertising revenues in medium and small markets are decreasing – for example, advertising spending in major categories such as automotive and certain retail segments is generally down.[16] In addition, television stations are facing increasing competition for advertising revenues from local cable. Local cable advertising grew at annual compound rate of 10 percent between 1999 and 2004 and is projected to grow at a rate of almost 15 percent between 2004 and 2009; conversely, spot ad revenue for local broadcast stations grew at only a three percent rate annually from 1999 to 2004 and has an expected annual compound rate of growth of just 3.8 percent until 2009.[17]

Television stations also are competing more and more with other content providers, including the Internet, for advertising revenue as even local companies can advertise on Google.[18] In fact, billions of dollars were spent on Internet advertising last year.[19] In addition, stations are losing revenues because networks are reducing or eliminating compensation and, in some instances, even seeking compensation from stations to permit network affiliation or in

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16 According to TNS Media, six of the top ten advertisers in 2004 (Proctor & Gamble, Ford Motor Company, AT&T, Daimler Chrysler, Walt Disney Co. and Johnson & Johnson) decreased their television spending in 2005.

17 *State of the News Media*, www.stateofthenewsmedia.org/2006/narrative_localtv_economics.asp?cat=4&media=7.

18 If one goes to Google.com, enters a city and state plus "car dealers," Google will provide the following: *Local Results for Car Dealers near* city, with a list of dealers who have paid Google to be placed under that heading. For example, an Arlington, Virginia "car dealers" search results in listings for Brown's Arlington Nissan and Rosenthal Chrysler Jeep. In Billings, Montana one finds Prestige Toyota and Rimrock Subaru.

19 *State of the News Media*, www.stateofthenewsmedia.org/2006/narrative_online_economics.asp?cat=4&media=4.

certain cases, such as NFL and NCAA programming, are charging broadcasters for the rights to carry programming.[20] All these factors are squeezing television station revenues.

At the same time, station operating costs are increasing. In 2002, several commenters emphasized the increasing cost of producing local news and these costs have continued to increase.[21] For example, for KARK-TV, Nexstar's station in Little Rock, Arkansas (DMA 57), Nexstar will spend approximately $3,160,000 in 2006 to produce 24.5 hours of local news per week; and for WDHN, Nexstar's station in Dothan, Alabama (DMA 172), Nexstar will spend approximately $720,000 in 2006 to produce fifteen hours of local news per week. In a recent survey of news directors, only 44.5 percent reported their stations earn a profit on news programming while 12.1 percent reported their stations are losing money on news.[22] In addition, television broadcasters have spent hundreds of thousands of dollars to convert to full-power digital transmission systems and now will spend even more to convert their local programming to digital. Stations must purchase digital equipment and update sets to begin providing locally-originated DTV programming. Yet, unlike MVPDs, local broadcasters cannot recoup these costs from other sources such as increased subscriber fees.

In 1999, when the Commission adopted the Current Local TV Ownership Rule, the Commission recognized that "there are significant efficiencies inherent in joint ownership . . . of

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[20] Because networks have many more methods to provide viewers with content beyond affiliation with local television stations, the balance of power between networks and their affiliates has shifted very much in favor of the networks, with the networks using this shift to reduce or terminate compensation or charge stations for network affiliation.

[21] *See* Comments of Gray Television, Inc. at p. 17; Comments of Duhamel Broadcasting Enterprises at pp. 5-6; and Comments of Granite Broadcasting Corporation at pp. 11-12 (filed Jan. 2, 2003 in the 2002 Biennial Review proceeding, MB Docket 02-277).

[22] *State of the News Media*, www.stateofthenewsmedia.org/2006/narrative_localtv_economics.asp?cat=4&media=7.

television stations in the same market . . . and . . . these efficiencies can contribute to . . . benefits such as increased news and public affairs programming, and, in some cases, can ensure the continued survival of a struggling station."[23] As the Commission recognized, duopolies generate efficiencies in non-programming areas such as the co-location of facilities, sharing of equipment, and sharing of station administration and engineering personnel.[24] When adopting the 2003 Local TV Ownership Rule, the Commission recognized that "the data confirm that the ability of local stations to compete successfully . . . is meaningfully (and negatively) affected in mid-sized and smaller markets."[25] Consequently, the cost savings generated through the efficiencies of duopoly ownership are critically important in medium and small markets. Duopolies permit stations to eliminate redundancies through the sharing of equipment and personnel. It is the savings generated through these efficiencies that permit a station to increase news and other local programming. Moreover, a station not teetering on the edge of survival is more likely to host or sponsor political debates and community forums and participate (or participate at a higher level) in local community activities. Thus, duopolies provide an opportunity for more diverse and better local programming and local community interaction.

Television broadcasters operating with losses are more likely to eliminate or reduce the amount of local programming they broadcast, including local news, and have only limited ability to make technical improvements or engage in innovation. Indeed, the combination of decreasing revenues and increasing expenses lead to the stark reality that many broadcasters are faced with having to reduce staff and locally originated programming. The efficiencies generated through

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[23] *1999 Biennial Review Order* at p. 12930.

[24] *Id.*

[25] *2002 Biennial Review Order* at p. 13698.

duopolies can help offset this Hobson's choice and may be the difference between maintaining local programming on local TV broadcast stations and operating with no local programming.

A. Duopoly Ownership Will Not Harm Programming.

Public interest groups repeatedly have claimed that viewers are harmed by duopolies because there is only one "voice" providing news and public affairs programming for both stations. Such arguments are counter-intuitive. When one owner owns two stations, the owner has incentive to provide differing information and programs on its two stations for maximum diversity in order to reach the widest possible audience. Indeed, there is no real benefit to the owner from broadcasting identical newscasts on two different stations because ultimately the owner wants to attract diverse viewership to each newscast to provide the most opportunity to maximize its advertising revenues. In those markets where Nexstar produces news for a second station (under a shared services arrangement), Nexstar diligently works to create separate and distinct newscasts for each station. Although some content may be shared, each newscast contains content that is unique to that station. In addition, the shared content frequently is presented differently on the two stations. For example, on one station the newscast may be extremely "hard-hitting," whereas on the second station the newscast will be more "friendly" in nature. Anchors and the look and presentation of the news may be different as well.

Duopolies also permit broadcasters to launch or expand news and/or public affairs programming for the market. In Wilkes-Barre-Scranton, Pennsylvania, where Nexstar produces local news for its station WBRE-TV and for another station (WYOU, owned by Mission Broadcasting) pursuant to a shared services agreement, Nexstar has added 6.5 hours per week of local news on WBRE-TV and 5 hours per week of local news for WYOU. In Rochester, New York, Nexstar produces news for WUHF (owned by Sinclair Broadcasting) pursuant to an outsourcing agreement and has added an additional 3.5 hours per week of local news to WUHF's programming line-up. In Abilene, Texas, Nexstar increased local news programming on its station, KTAB-TV, by 4 hours per week and increased local news programming on KRBC-TV (owned by Mission Broadcasting) by 13.5 hours per week when the parties initiated a shared services agreement. In virtually all markets where Nexstar is producing news for more than one local station, the amount of local news programming has increased.[26]

Nexstar further notes that its shared services agreements have generated efficiencies in news programming for both stations through reductions in duplicative personnel. For instance, Nexstar can send one cameraperson with each station's separate on-air news personnel to cover a mayoral press conference, instead of each station sending its own separate cameraperson. The savings generated can be reallocated within the newsroom (or to other departments) for additional staffing or for the purchase of updated newsroom or station equipment. In addition, in the majority of markets where Nexstar has implemented shared services arrangements, Nexstar and the other licensee have been able to preserve or expand existing newscasts while also making technological investments, such as adding advanced Doppler weather radar systems and purchasing satellite uplink trucks to permit more live broadcasts.

Public interest groups also claim that permitting duopolies harm children's programming because station owners will re-purpose the same children's programming on both stations. This assertion is completely without merit. Indeed, the majority of core children's programming is provided to stations via their network affiliations. Thus, it would be nearly impossible for a broadcaster to provide the same three hours of core children's programming on two co-owned

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[26] Nexstar generally has increased news programming on its stations upon acquisition of those stations from the prior licensee. In total, Nexstar currently is producing 585 hours of news programming per week for 39 stations.

stations, because of the stations' different network affiliations. Furthermore, as with non-children's syndicated content, there is very little incentive for a broadcaster to re-purpose its syndicated children's television programming because broadcasting identical programming on two stations does not lead to increased viewership and does not maximize station revenues.[27]

As many local television broadcasters recognize, strong local programming is key to station survival because it is this content that attracts and keeps the station relevant to local viewers and generates the highest advertising revenues for the station. Accordingly, permitting a licensee to own two stations in a market regardless of station ranking will not harm, and more likely will advance, programming in the public interest.

B. Duopoly Ownership Will Not Harm Localism.

The Commission has defined localism as the airing of programming responsive to the needs and interests of the communities of license.[28] Nexstar would go beyond the Commission's definition to include a broadcaster's efforts beyond programming to serve its local community's needs. Nexstar is aware that several public interest organizations claim that permitting consolidation reduces community awareness. These organizations may be correct with respect to the specific instances they have documented. However, Nexstar believes it is entirely unfair to tar the entire television broadcasting community based on the actions of the few. Nexstar encourages its local managers to focus on matters of importance to the local community. Thus, Nexstar's stations broadcast important high school football games, local parades and local

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[27] Nexstar also notes that if the Commission is concerned about ensuring that a licensee broadcast different children's programming on its co-owned stations, the Commission can regulate such programming through rules outside of the Local TV Ownership Rule. For example, the Commission could address any concern through its on-going children's programming proceeding as it relates to core children's programming in the digital world.

[28] *Broadcast Localism, Notice of Inquiry*, 19 FCC Rcd 12425 (2004).

political debates; they provide coverage of local events (in advance of and at the time of such events); they provide free PSA time to local organizations; they encourage station employees to volunteer with local charitable organizations; and they sponsor community activities such as blood drives and health screenings.[29] Indeed, many local charitable organizations can attribute their growth to direct relationships with local television partners.

Nexstar also believes that using the Commission's ownership rules to artificially foster localism is not ultimately a viable way to ensure that all stations are engaged in meeting the needs of their local communities. Even if the Commission were to mandate that every station in a market be separately owned, such a rule would not guarantee that each and every owner will meet local needs and interests. Furthermore, the Commission can ensure that localism remains vibrant through its license renewal process because the Communications Act requires the Commission to make a finding that a licensee has served the public interest, convenience and necessity before granting its application for renewal of license.[30]

Most broadcasters are well aware that service to a station's local market – localism – is a major part of a ensuring a station's survival. This is so whether a broadcaster owns one station or two. Duopoly owners have no incentive to eliminate local news and public affairs programming from co-owned stations, because it is this programming that attracts viewers to the stations and generates the greatest profits. In fact, as the Commission has observed, duopoly owners are better able to preserve or even raise their level of local news and public affairs

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[29] See Nexstar's filings in MB Docket 04-233 for a comprehensive summary of local community support provided by Nexstar's stations.

[30] 47 U.S.C. §309(k).

programming.[31] Moreover, a TV broadcaster's desire and commitment to provide service to its local community is entirely unrelated to how many stations it owns in a local market. Without a doubt, it is not in a duopoly owner's interest to reduce its level of outreach and service to the community because it is these actions that generate goodwill in the community at large. Why would a broadcaster stop or reduce such efforts simply because it owns two stations?

IV. THE ISSUES RAISED BY THE COURT DO NOT PREVENT THE COMMISSION FROM PERMITTING COMMON OWNERSHIP OF TWO TOP-FOUR RANKED TELEVISION STATIONS.

In the *Prometheus* decision, the Court agreed with the Commission that commonly-owned stations are more likely to carry local news and that consolidation generally improves audience ratings and benefits localism.[32] However, the Court raised questions about the numerical limits set by the Commission, finding no evidence to support the Commission's determination that each station in the market was an equal-sized competitor regardless of a station's actual audience share.[33] The Court also questioned the degree to which the Commission can rely on cable or the Internet to mitigate the threat that consolidation poses to viewpoint diversity.[34] In addition, the Court questioned the Commission's failure to determine the impact on minorities of its decision to eliminate the "demonstration of no out-of-market buyer" requirement from the showing that must be made for a waiver of the 2003 Local TV

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[31] *2002 Biennial Review Order* at p. 13685.

[32] *Prometheus*, 373 F.3d at p. 415.

[33] *Id.* at pp. 418-19.

[34] *Id.*

Ownership Rule and instructed the Commission to consider proposals for advancing diversity in broadcasting while addressing the remand issues.[35]

The Court was correct to question the Commission's creation of an artificial antitrust construct based on a benchmark comprised of six equal owners tied to the number of stations owned. As the Court stated, the Commission's decision to create an antitrust construct based on numbers of station owners in a market without considering the actual realities of the market creates "a glaring inconsistency." This is so because the Commission's artificial construct could lead to one or more owners holding anticompetitive market shares. For example, under the 2003 Local TV Ownership Rule, in a market with five stations with audience shares of 44, 20, 19, 11 and 6, the owner of the station with an audience share of 44 could acquire the station with an audience share of 6, creating a station owner with 50 percent of the market's audience share; yet the owner of the station with an audience share of 20 could not acquire either the station with the 19 share (giving that owner a combined share of 39) or with the 11 share (giving the owner a combined share of 31). Therefore, Nexstar recommends that the Commission not try to create an artificial antitrust construct and simply use the DOJ/FTC merger guidelines to determine anticompetitive effects. Nexstar further urges that when conducting its antitrust analysis, the Commission should not limit its definition of "market" to broadcast television stations, but rather the Commission should define the market to include all media that provide viewers with information and entertainment choices, including non-broadcast channels delivered only by MVPDs, as well as local radio, newspapers, and the Internet.

Although the Court's concerns regarding the ability of cable and the Internet to mitigate threats may have had some validity in 2004, such concerns certainly are misplaced *now*. As

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[35] *Id.* at p. 421.

stated in Section II *supra*, in the last two years cable and the Internet have grown exponentially. Cable companies provide more than a 100 programming channels, are producing local news channels and are competing directly with local television for advertising revenues. And the Internet is more and more becoming a place people go for their entertainment, news and social connections. Indeed, the Internet has fully become what Congress envisioned in 1996 when it adopted the Communications Decency Act. As Congress stated then, the Internet is "a forum for a true diversity of political discourse [flourishing] to the benefit of all Americans [and Americans increasingly] relying on interactive media for a variety of political, educational, cultural, and entertainment services."[36] Thus, cable and the Internet have fully joined broadcast radio and television and newspapers as key components of our communications marketplace.

With respect to the Court's concern regarding the Commission's policies for advancing broadcast ownership by small businesses (and elimination of the "no out-of-market buyer" requirement), Nexstar believes the Commission has authority to adopt proposals that will assist smaller buyers in entering the broadcast industry.[37] For example, the Commission could consider relaxing the EDP rule for non-attributable interest holders of small business entities and/or creating incentives for larger broadcasters to "incubate" small business broadcast owners. Or the Commission could work with lenders and private equity funds to assist small businesses in obtaining the funds necessary to enter the broadcast arena. (A one-step type program whereby

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[36] *See* 47 U.S.C. §230(a)(3-5).

[37] Indeed, with the recent release of the Free Press's study *Out of the Picture: Minority & Female TV Station Ownership in the United States*, Nexstar believes it is incumbent upon the Commission to adopt policies that will assist small businesses to enter the broadcast industry. Nexstar nonetheless cautions the Commission that it should not let the current paucity of minority and women-owned stations prevent the Commission from adopting much needed regulatory relief for small and medium market television broadcasters with no other local radio, cable or newspaper interests.

the Commission facilitates informing small businesses of the availability of divestiture stations and provides guidance for small businesses to obtain funds for such purchases would be a very effective way to assist small businesses to participate in purchases when broadcast companies are required to divest certain properties in multi-market transactions.) However, the Commission should not use concerns about minority ownership as an excuse to avoid changing the Local TV Ownership Rules to permit television broadcasters with no other in-market media interests to own two commercial TV stations in a market. Nexstar's proposal will have a neutral effect on small broadcasters because it provides the same opportunities and benefits to all broadcasters in medium and small markets equally. Moreover, at least one minority broadcaster would go further than Nexstar and has requested that the Commission fully repeal the local TV ownership rule.[38]

V. A RULE CHANGE IS NECESSARY FOR LOCAL BROADCAST TELEVISION STATIONS.

Companies such as News Corp., GE, Disney, Time Warner and Viacom/CBS dominate the media landscape.[39] "Big Media" now also includes companies such as Google and Yahoo!, whose competitive presence was not anticipated even five years ago. Google and Yahoo! are ranked 19th and 21st respectively among the 100 leading media companies, with both companies

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[38] *See* Comments of Granite Broadcasting Corporation, filed Jan. 2, 2003 in the 2002 Biennial Review proceeding, MB Docket 02-277, urging the Commission to repeal the local TV ownership rule because "the rule artificially and unfairly restricts the ability of local television broadcasters to compete in the marketplace against more dominant market participants."

[39] These companies own numerous television stations in major markets; a significant percentage of the cable programming networks carried by most cable systems; newspapers, magazines, and book publishing companies; film and other production companies; well-known and highly frequented websites; and various other media such as cable or satellite providers (Time Warner and News Corp.) and radio stations (CBS).

now selling billions of dollars of advertising per year.[40] The Local TV Ownership Rules do not address the realities of today's competitive media marketplace and have created an uneven playing field between pure television broadcasters and Big Media. Thus, it is critical that the Commission revise the Local TV Ownership Rules to permit a broadcaster with no other in-market ownership interests (i.e., no attributable local radio, cable or newspaper ownership interests) to own two television stations in any market with at least four stations regardless of station rankings, subject only to antitrust concerns. Otherwise, local programming may become increasingly scarce.

Both the Current Local TV Ownership Rule and the 2003 Local TV Ownership Rule prohibit common ownership of two stations ranked among the top-four stations in the market (as derived from the stations' most recent all-day audience shares as measured by a professional ratings service such as Nielsen). Nexstar urges the Commission to eliminate these ratings-based prohibitions because such ratings impose an arbitrary and mechanical limit without consideration of actual market factors. For example, station ratings are inherently connected to how well the station's network-affiliated and syndicated programming attract viewers in the market. In addition, using only broadcast station ratings to rank stations looks at an "artificial" market because it does not take into account cable network programming ratings. Nor does a ratings-based prohibition take into account ratings anomalies.

Moreover, elimination of the top-four prohibition will not harm competition, diversity or localism. The two commonly-owned stations will still compete with each other for viewers because it is in the licensee's interest to attract the most diverse viewership to enhance overall

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[40] *100 Leading Media Companies Report; Revenue Hits $268 Billion*, Advertising Age, Oct, 2, 2006, http://adage.com/print?article_id=112235. Nexstar anticipates that with Google's acquisition of YouTube, Google will be in the top ten, if not the top five, media companies next year.

revenues (otherwise the second station may as well just be a satellite of the first). Furthermore, the co-owned stations will operate with different network affiliation agreements and the networks actively compete with each other. The stations also will broadcast different children's programming because, as with regular content, there is no benefit to the licensee through the broadcast of identical children's programming. Furthermore, most television broadcast licensees do not choose syndicated programming or produce local programming with a "how-low-can-we-go" goal. It is not in the licensee's best interest to program for 18-24 year old men because such a focus will drive viewers to other stations, which ultimately reduces station revenues. Accordingly, it is time for the Commission to recognize that permitting a television broadcaster with no other attributable in-market media interests to own two UHF stations in Rockford, Illinois or Erie, Pennsylvania will not convert the broadcaster to a member of Big Media – and, in fact, will help insure that local antidotes to Big Media continue to exist.

Further, it is time for the Commission to stop making policy decisions based on theoretical harms and unsupported speculation. For example, the Commission has claimed that the existing Local TV Ownership Rules are necessary on the unsupported (and errant) theory that joint ownership reduces competition for viewing audience. Yet, the reality is that each commonly owned station competes with every other station in the market, including co-owned stations, for viewers in order to maximize revenues. Moreover, the network with which each station is affiliated has its own incentives to produce strong programming because the networks also are competing with each other for viewers and revenues.[41] The Commission also has claimed that the existing Local TV Ownership Rules are necessary on the unsupported (and

[41] For example, this fall, *Grey's Anatomy* (one of ABC's top programs) has been moved to the same period as CBS's *CSI, Crime Scene Investigation* while CBS has moved its popular show *Cold Case* to the same time period as ABC's *Desperate Housewives*.

errant) theory that joint ownership reduces broadcasters' service to their local communities. The Commission's assumption that a local television broadcaster would stop providing service to local viewers, thereby pushing local viewers to other sources for information and entertainment, is neither believable nor realistic in today's competitive environment. Indeed, in Nexstar's experience the efficiencies resulting from common ownership lead to more local programming and more community involvement, not less.

It is equally important that the Commission stop making policy choices based solely on the concept of protecting the small percentage of viewers who don't have access to the vast array of other communications media. Indeed, it is these viewers who will be most harmed by the Commission's failure to adjust its rules to market realities to permit a television-only broadcaster to own two television stations in a market regardless of station rank. As television stations become less profitable they will eliminate the local programming that these viewers rely on. But permitting common ownership of two stations creates two stronger stations. Stronger stations can afford to offer better service and more local content to those viewers who rely solely on over-the-air local television broadcasts for news and information. Thus, revising the duopoly rule to permit common ownership of two stations in a market regardless of station rankings will ultimately help consumers who rely solely on free, over-the-air broadcast television as their primary source for news and information.

VI. CONCLUSION.

Local television stations play a vital role in their communities by providing numerous viewer and community benefits, including weather information, AMBER alerts and other critical emergency information, as well as news and public affairs programming. However, many medium and small market stations are losing revenues as a result of unprecedented levels of competition from other media, while station expenses, particularly those associated with producing local news programming, continue to increase. For medium and small market stations to compete in today's media marketplace, the Commission must allow smaller market licensees to take advantage of the operating efficiencies generated through common ownership of two stations in a market. When small market licensees are not simply fighting to survive, they can better serve their communities. The Commission should consider today's realities and permit common ownership of two TV stations in medium and small markets.

WHEREFORE, for the foregoing reasons, Nexstar respectfully urges the Commission to relax the Local TV Multiple Ownership Rule to allow television broadcasters with no other in-market media interests to own two commercial TV stations in any market.

Respectfully submitted,

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